Controversies in Caracas

Diplomatic asylum: regional customary law or treaty application?

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After the failure of the uprising of the Venezuelan opposition, prosecuted politicians and military members are seeking refuge in the diplomatic representations of Brazil, Spain, Argentina and Italy. One might wonder if these incidents give reason to reconsider the existence of a regional customary rule on diplomatic asylum in Latin America.

Diplomatic circumstances – controversial interests

Diplomatic asylum is not codified, as it was left aside when the International Law Commission codified the rules on diplomatic privileges and immunities (*Foaks/ Denza*, Privileges and Immunities of Diplomatic Missions, in, Roberts (ed.), Satow's Diplomatic Practice, 7th edition 2017, para. 13.22). Despite the controversial concept in itself not being codified, two written rules on the matter remain of importance: Article 22(1) and Article 41 (1) of the Vienna Convention on the Law of Diplomatic Relations (VCDR).

The first rule provides for the inviolability of a diplomatic mission's premises and makes the entry of agents of the host State conditional on permission by the head of mission. Thus, once a person fleeing from prosecution in the host State has reached the diplomatic premises of a foreign mission within the host State, his or her further prosecution depends on the guest State's permission. The latter rule foresees that the mission staff must respect the laws and regulations of the host State and – in particular – has a duty not to interfere in the internal affairs of the host State. The granting of asylum to someone who might be responsible for a (military) uprising, has the effect of hindering his or her prosecution and therefore can be considered as an interference with the internal affairs of the host State (on this question, compare here).

A life in a golden cage?

In the *diplomatic asylum* case of the International Court of Justices (ICJ), the Court assessed the refuge of Peruvian politician *Haya de la Torre* into the mission of Colombia in Lima after a failed military coup – his asylum there lasted five years. Other famous cases arising around this issue give reason to believe that diplomatic asylum will save the prosecuted from prosecution and conviction, however, the price for "freedom" often is a life in a golden cage (*Julian Assange*: almost 7 years; Cardinal *Joszef Mindszenty*: 15 years). That being said, a look at the original diplomatic note of the ambassador of Colombia to the Peruvian authorities in the ICJ

diplomatic asylum decision shows that there is also a broader understanding of the concept of diplomatic asylum, which allows an escape from the golden cage:

> "(…) I request Your Excellency to be good enough to give orders for the requisite safe-conduct to be issued, so that Senior Haya de la Torre may leave the country with the usual facilities attaching to the right of diplomatic asylum." (Diplomatic note dated 4 January 1949, cited from: ICJ, Asylum Case (Colombia/Peru), Judgment of 20 November 1950, p. 11 – emphasis added).

Such an understanding is not only of major importance from the perspective of the prosecuted, but also from a legal perspective regarding the scope of the right: limiting a possible rule on diplomatic asylum to the embassies' premises would mean to leave the field of tension arising in between the provisions of Article 22(1) and 41(1) VCDR unsolved.

Venezuela 2019 = Peru 1948?

The events of the last weeks mirror the situation of the original ICJ decision. After the failed military coup Mr. *Leopoldo Lopez* and several other Venezuelan opposition members sought refuge in different foreign missions. Nevertheless, even if the facts in these cases are said to be similar, the question arises as to whether the legal assessment of diplomatic asylum will – almost 60 years after the ICJ's judgement on the matter – come to the same conclusion.In its 1950 decision, the ICJ denied the existence of a customary rule on diplomatic asylum and – in particular – the existence of a *regional* customary rule on diplomatic asylum:

> "The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum (…) that it is not possible to discern in al1 this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence. The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru (…)." (ICJ, Asylum Case (Colombia/Peru), p. 15).

International law clearly denies the existence of a regional rule on diplomatic asylum since the ICJ's 1950 judgement (*Foaks/Denza*, Privileges and Immunities of Diplomatic Missions, para. 13.22). However, it seems that some authors argue the existence of a regional rule on diplomatic asylum in Latin America (*Thirlway*, The Sources of International Law, in, Evans, International Law, 4th ed. 2014, *p. 102*). The current events could therefore potentially be seen as evidence of the existence of such a regional customary rule.

Unclear basis for a regional rule

As regards to the basis of a customary regional rule, reference is often made to Judge *Alvarez'* famous dissenting opinion in the *diplomatic asylum* case of the ICJ

(*Shah*, Diplomatic Asylum, Max Planck Encyclopedia of Public International Law, 2007, para. 7). However, Judge *Alvarez'* conclusions on the matter remain in fact unclear as to whether such a regional diplomatic custom exists:

> "the institution of asylum is a part of Latin-American international law because that institution is applied in the Latin countries of the New World in a special manner (…)." (ICJ, Asylum Case, 1950, Dissenting Opinion Judge Alvarez, p. 33 – emphasis added.)

It is difficult to fit this understanding of Judge *Alvarez* into the sources of public international law as we know them. If he wanted to argue a regional customary rule on the matter existed, then one could assume that he would have stated that the prerequisites of such a rule – *consistent State practice* and *opinion juris* (ICJ, *Continental Shelf (Libyan Arab Jamahiriya/Malta),* Judgment of 3 June 1985, p. 29, para. 27) – could be found in Latin-America. It is therefore contradictory when he later continues:

> "(…) there is no customary American international law of asylum properly speaking; the existence of such a law would suppose that the action taken by the Latin States of the New World was uniform, which is not at al1 the case: (…) But if there is no customary Latin-American international law on asylum, there are certain practices or methods in applying asylum which are followed by the States of Latin America." (ICJ, Asylum Case, 1950, Dissenting Opinion Judge Alvarez, p. 33 – emphasis added.)

Caracas – the hometown of diplomatic asylum

Not only stand the current events in the Venezuelan capital at the heart of this assessment, it was also in Caracas where some of the Latin American States – as a reaction to the 1950 ICJ judgement – signed, and partly ratified, the Caracas Convention. The Convention guarantees in its Article I.1 asylum in "*legislations, war vessels and military camps or aircraft, to persons being sought for political reasons or for political offenses*". Consequently, if members of the Venezuelan opposition are now granted diplomatic asylum in the missions of State parties to the Caracas Convention (e.g. Argentina, Brazil), no proof of a regional customary rule arises, but rather it is treaty law which is applied.

Other inter-Latin American examples support this conclusion. Recent examples of States granting asylum always included States that are party to the Caracas Convention (for recent examples of Brazilian practice compare: here and here). That being said, in these cases the prosecuting States – Honduras and Bolivia – protested against the Brazilian practice. These protests may – if conducted consistently – amount to *persistent objection* and hence hinder the application of a regional customary rule regarding these two States. Thus, a regional rule in Latin America common to all Latin American States would not exist.

Furthermore, also the 2002 events around Mr. *Pedro Carmona*, another Venezuelan opposition politician who sought refuge in the Colombian mission to Caracas and was eventually granted safe passage by Venezuela, will not allow for another

conclusion. Despite the fact that Colombia did not ratify the Convention, the acceptance of the Colombian asylum does not reflect a customary rule to which Venezuela believes itself to be bound to. It is much more likely that Venezuela is abiding by Article of XX of the Caracas Convention, according to which the granting of diplomatic asylum is independent of reciprocity.

What to conclude from this?

From a factual perspective, Venezuela 2019 may be considered similar to Peru 1948. To draw a different legal reasoning from these facts from that of the ICJ would, however, be farfetched. First of all, the initial maneuver of Judge *Alvarez* seems to be uncertain on the issue of the legal basis for a regional customary rule regarding diplomatic asylum in Latin America. The considerations of his dissenting opinion are unclear as to whether they aim to establish a legal rule or only “practice”. Secondly, the subsequent practice in Latin America seems to be treaty based rather than reflecting any regional customary norm. Thirdly, even if there is evidence of practice and *opinio juris* by some States, there is also frequent resistance by other States who might invoke the figure of *persistent objection* and thereby prevent the creation of a common regional custom.

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